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**Smith's Food and Drug Centers, Inc. d/b/a Fry's Food Stores and Amy Pfeifer.** Case 28–CA–109817

December 16, 2014

**DECISION AND ORDER**

BY MEMBERS MISCIMARRA, HIROZAWA,  
AND SCHIFFER

On April 1, 2014, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

The complaint originally alleged that the Respondent violated Section 8(a)(1) of the Act by denying Charging Party Amy Pfeifer her *Weingarten*<sup>3</sup> rights by denying her the union representative of her choice at an investigatory interview. The General Counsel amended the complaint at the beginning of the hearing to allege that the Respondent further violated Section 8(a)(1) by not allowing Pfeifer to confer with her employer-appointed representative before the interview and by directing the representative not to speak during the interview. The judge found all of the alleged violations. For the reasons discussed below, we agree.

**I. BACKGROUND**

At the time of the events in this case, Amy Pfeifer was employed as a barista at the Respondent's store 673 in Phoenix. The Respondent was investigating alleged employee misconduct, including theft, at that facility. Pfeifer contacted her union representative, Kaitlyn Sulli-

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> As explained below, we shall limit the posting of the remedial notice to the facility involved in this case. We shall also provide for electronic notice posting pursuant to *J. Picini Flooring*, 356 NLRB No. 9 (2010), and shall modify the notice in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

<sup>3</sup> *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

van, believing that the Respondent might discipline her when she next reported for work, on July 16, 2013.<sup>4</sup> The two arranged that Sullivan would be working in the vicinity of the store and waiting for Pfeifer's call that day.

On July 16, during Pfeifer's shift, the Respondent summoned her upstairs to the store manager's office to be interviewed by the Respondent's loss prevention specialist, Greg Powell. Upon arrival, Pfeifer requested Union Representative Sullivan by name and said that Sullivan was waiting for her call. Powell, however, did not permit Pfeifer to call Sullivan.

Instead, Powell decided that Marie Long, a floor shop steward, would attend the interview, and he dispatched Assistant Store Manager Sandra Lakso to bring Long to the office. Long did not know why she had been summoned. In fact, as Lakso was escorting Long to the office, Long asked Lakso if she (Long) was in trouble. When Long entered the office, Powell and Lakso immediately directed her to sit off to the side, and Lakso specifically instructed Long that she was there only to "observe and listen." Long understood this to mean that she was not permitted to ask any questions and was just to be quiet during the interview.

**II. DISCUSSION**

The judge found that the Respondent violated Section 8(a)(1) by denying Pfeifer her *Weingarten* rights at the July 16 interview. In its exceptions, the Respondent argues that its conduct was not unlawful and that the judge erred in granting the General Counsel's request to amend the complaint at the hearing. We find no merit in either contention.

*A. The Complaint Amendment*

The Respondent argues that because the General Counsel amended the complaint on February 25, 2014, more than 6 months after the events of July 16, the amendment was untimely under Section 10(b) of the Act, which requires that unfair labor practice charges be filed and served within 6 months after the allegedly unlawful conduct. It has long been held, however, that a complaint may be amended to allege conduct outside the 10(b) period if that conduct took place within 6 months of a timely filed charge and is "closely related" to the allegations of that charge. See, e.g., *Redd-I, Inc.*, 290 NLRB 1115, 1115 (1988). In determining whether allegations are closely related, the Board considers:

- (1) Whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge;

<sup>4</sup> All dates are in 2013, unless otherwise noted.

- (2) Whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge; and
- (3) Whether a respondent would raise the same or similar defenses to both the otherwise untimely and timely allegations.

*Redd-I, Inc.*, 290 NLRB at 1118; *Carey Salt Co.*, 360 NLRB No. 38, slip op. at 6 (2014).

Applying the *Redd-I* analysis, we find that the two new allegations—that the Respondent unlawfully denied Pfeifer her right to confer with Long and ordered Long not to speak during the investigatory interview—are closely related to the timely charge, which alleges that the Respondent unlawfully denied Pfeifer her choice of *Weingarten* representative. The first prong of the *Redd-I* test—whether the allegations involve the same legal theory—is satisfied because all three allegations concern the Respondent’s denial of Pfeifer’s *Weingarten* rights at the July 16 interview.

The second prong of *Redd-I*—whether the allegations arise from the same factual situation or sequence of events—is also satisfied. All three allegations involve the same individuals and arise from the same brief sequence of events during the July 16 interview. See *Trim Corp. of America*, 349 NLRB 608, 608–609 (2007) (finding 8(a)(1) and (5) allegations closely related where they arose out of the same sequence of events involving the same supervisor).

As for the third *Redd-I* prong—whether a respondent would raise the same or similar defenses to both allegations—we find that a respondent would do so given the nature of the allegations here. All three allegations turn on the application of *Weingarten* to the facts of this case. As a result, a respondent’s defenses would be limited to arguing over what was (or was not) said during the interview and the legal significance of those statements. See *Trim Corp.*, above at 609. And, indeed, this is precisely the nature of the Respondent’s defenses, which are based largely on the credibility of its witnesses’ testimony.<sup>5</sup>

<sup>5</sup>The “same or similar defenses” prong of the *Redd-I* test is concerned, at least in part, with “whether a reasonable respondent would have preserved similar evidence and prepared a similar case” in defending against the untimely allegations as it would in defending against the timely allegations. 290 NLRB at 1118. The Respondent does not claim that it failed to preserve relevant evidence or was unable to prepare an effective case against the new allegations. Indeed, the Respondent admits that 4 days before the hearing, the General Counsel filed a notice of intent to amend the complaint to add the new allegations. Thus, the Respondent was on notice of the need to prepare to defend against the newly added allegations, and it does not contend that the notice was insufficient for that purpose.

In sum, all three *Redd-I* factors indicate that the otherwise untimely allegations are “closely related” to those in the timely filed charge. We therefore find that the judge appropriately granted the General Counsel’s request to amend the complaint at the hearing.

### B. The 8(a)(1) Allegations

In *Weingarten*, above, the Supreme Court approved the Board’s holding that an employee has a Section 7 right to the presence of a union representative at an investigatory interview that the employee reasonably believes may result in discipline. 420 U.S. at 260–263. For the reasons discussed in his decision, we affirm the judge’s finding that the Respondent unlawfully denied Pfeifer her choice of union representative at the July 16 investigatory interview when it prevented Pfeifer from calling Sullivan.

Likewise, we agree with the judge that the Respondent denied Pfeifer her right to effective *Weingarten* representation by instructing Steward Long that she was at the interview only “to observe and listen.” As the Supreme Court recognized, the role of the union representative under *Weingarten* includes providing assistance and counsel to employees who may lack the ability to express themselves. *Weingarten*, 420 U.S. at 260–263 and fn. 7. A union representative therefore is entitled to give “advice and active assistance” to the employee and need not “sit silently like a mere observer.” *Washoe Medical Center*, 348 NLRB 361, 361 (2006). A “mere silent presence . . . [is] insufficient to alter the imbalance which the Supreme Court sought to alleviate in its *Weingarten* opinion.” *Southwestern Bell Telephone Co.*, 251 NLRB 612, 613 (1980), enf. denied 667 F.2d 470 (5th Cir. 1982).<sup>6</sup> Unlike our dissenting colleague, we agree with the judge that Long—who was herself concerned about being disciplined when Lakso unexpectedly summoned and escorted her to the store manager’s office and then directed her where to sit—reasonably construed Lakso’s instruction “to observe and listen” to mean that she must remain silent and not interrupt the interview.<sup>7</sup>

<sup>6</sup>To be sure, an employer in an investigatory interview is free to insist upon hearing the employee’s own account of the matter under investigation, and is under no obligation to bargain with the union representative during the interview. *NLRB v. J. Weingarten*, 420 U.S. at 259–260. Here, however, the Respondent denied Long any opportunity to participate in the July 16 meeting.

<sup>7</sup>Cf. *The Roomstore*, 357 NLRB No. 143, slip op. at 1 fn. 3 (2011) (recognizing that in 8(a)(1) cases the Board’s “task is to determine how a reasonable employee would interpret the action or statement of her employer, and such a determination appropriately takes account of the surrounding circumstances”) (internal citation omitted); *Double D Construction Group*, 339 NLRB 303, 303 (2003) (recognizing that under Sec. 8(a)(1) “[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction”).

## FRY'S FOOD STORES

Contrary to our dissenting colleague, we also agree with the judge that the Respondent unlawfully precluded Pfeifer from conferring with Long before the July 16 interview. A union representative's ability to provide advice and active assistance "can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts." *Colgate-Palmolive Co.*, 257 NLRB 130, 133 (1981) (quoting *Climax Molybdenum Co.*, 227 NLRB 1189, 1190 (1977), enf. denied 584 F.2d 360 (10th Cir. 1978)). Consequently, the right to representation under *Weingarten* "clearly embraces the right to prior consultation." *Climax Molybdenum Co.*, above at 1190. Such consultation was foreclosed here when the Respondent refused to honor Pfeifer's reasonable request to contact Sullivan, with whom she had discussed the investigation. Instead, with Pfeifer already sitting in the store manager's office, the Respondent summoned Long, who was unfamiliar with Pfeifer's situation and immediately instructed her that she was there only "to observe and listen."

The dissent and the Respondent both argue that the judge erred in finding this violation because neither Pfeifer nor Long requested a preinterview conference. We do not find that argument persuasive in the circumstances presented here. Powell had already unlawfully denied Pfeifer her choice of union representative and then took it upon himself to appoint Long to serve in that capacity. From the moment of Long's arrival at the office, Lakso denied her any meaningful role in assisting Pfeifer. In these circumstances, we find that the Respondent foreclosed the possibility of Pfeifer or Long engaging in a preinterview discussion. Stated otherwise, we find that Powell and Lakso, by their words and actions, plainly conveyed to Pfeifer and Long that any request to do so would have been futile.<sup>8</sup>

### C. Notice Posting Requirement

As part of the remedy for the violations found, the judge ordered that remedial notices be posted in all of the Respondent's Phoenix-area stores. We find merit to the Respondent's exception to this requirement. Absent evidence that violations were committed pursuant to company policy or otherwise reflected a pattern or practice of

unlawful conduct, the Board's usual practice is to order notice posting at the facilities at which the violations were committed. See, e.g., *Consolidated Edison Co. of New York*, 323 NLRB 910, 911-912 (1997). This case involves discrete violations at only one facility, the Respondent's store 673. The judge suggested no reason, and we find none, why notice posting at that facility would not be sufficient to inform the affected employees of the violations and their rights under the Act. Accordingly, we shall order the Respondent to post the notice only at store 673.

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Smith's Food and Drug Centers, Inc. d/b/a Fry's Food Stores, Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

#### 1. Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its store 673 in Phoenix, Arizona, a copy of the attached notice marked "Appendix."<sup>3</sup> A copy of the notice, on a form provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent at store 673 and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 16, 2013."

<sup>8</sup> In affirming the judge on this issue, we find that, in the particular circumstances of this case, the absence of a request is not a bar to finding that the right to such a conference was unlawfully denied.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 16, 2014

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Kent Y. Hirozawa, Member

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Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) by denying employee Amy Pfeifer the union representative of her choice under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). I disagree, however, that the Respondent either denied Pfeifer her right to consult with Shop Steward Marie Long (Pfeifer's *Weingarten* representative) prior to her interview, or required Long to remain silent during the interview. I would therefore reverse and dismiss those two unfair labor practice findings.

Addressing the second issue first—my colleagues' finding that the Respondent silenced Long—I believe Long's own testimony, quoted in the judge's decision, demonstrates that Long was not silenced. According to Long, when she entered the manager's office, she saw Pfeifer, Assistant Manager Sandra Lakso, and Greg Powell, the Respondent's loss prevention specialist. Powell asked Long if she knew Pfeifer and Lakso, and Long said she did. Powell then said he was going to ask Pfeifer some questions. At the hearing, Long was asked if Powell said anything about her role in the meeting. Long answered, "No."<sup>1</sup> Long was specifically asked whether Powell said "anything in regard to whether or not you can ask questions." Long answered, "No." Long added that Lakso said Long "was there to observe and listen." Long then testified that she did not ask any questions during the interview, and that she "was not permitted" to ask questions, adding: "They told me I was just to be quiet. I was not to ask questions." However, on cross-examination, Long was asked who told her not to ask questions. Long answered, "Nobody."

<sup>1</sup> Powell testified that he told Long "that her job was to basically protect [Pfeifer's] rights, make sure that I wasn't belligerent, mean or violated her rights in any way." The judge did not resolve the contradiction between this testimony and Long's testimony that Powell said nothing about her role.

An employer violates Section 8(a)(1) if it prohibits an employee's *Weingarten* representative from speaking. "Such a limitation is inconsistent with the Supreme Court's recognition that a union representative is present to *assist* the employee being interviewed." *Barnard College*, 340 NLRB 934, 935 (2003) (citing *Weingarten*, 420 U.S. 251, 260 (1975)). But as the foregoing recitation of Long's relevant testimony demonstrates, the Respondent did not prohibit Long from speaking at Pfeifer's interview. Long *believed* she could not ask questions, but she never attempted to ask a question, and she admitted she was not *told* she could not ask questions. Lakso told Long that Long was there "to observe and listen." Observing and listening are, indeed, major aspects of a union representative's role at an investigatory interview. Moreover, the statement that Long should "observe and listen" is a fair description of the Supreme Court's holding in *Weingarten* itself that the employer (i) has no duty to bargain with the union representative, and (ii) "is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." *Weingarten*, 420 U.S. at 259, 260.

At most, the record establishes that Long *interpreted* Lakso's comment as a suggestion that she was forbidden to ask questions—even though, by her own admission, she never tried to ask a question, and neither Lakso nor Powell told her she could not ask questions. Long had no training in acting as a *Weingarten* representative, and her lack of training may have contributed to her misunderstanding of her role. However, it was not the Respondent's responsibility to ensure that Long understood her role. It had no affirmative duty to *inform* Long that she was permitted to speak. On this record, I cannot agree with my colleagues that the Respondent unlawfully silenced Long.<sup>2</sup>

Neither can I find that the Respondent denied Pfeifer her right to consult with Long before the interview began. Simply put, there was no denial because there was no request for a preinterview meeting (and *Weingarten* does not guarantee a preinterview meeting between the employee and the representative). My colleagues find that any request would have been futile, based in part on their finding that Long was silenced. As explained above, Long was not silenced. Besides, neither Long *nor* Pfeifer asked for prior consultation.

In sum, my colleagues find a *Weingarten* representative prohibited from speaking absent a prohibition on

<sup>2</sup> Even assuming my colleagues have applied the proper test in asking whether Long "reasonably construed" what was said to her as an order to remain silent—an issue I do not reach—I believe Long's interpretation of what Lakso said was unreasonable, for the reasons stated in the text.

## FRY'S FOOD STORES

speaking, and a request for a preinterview meeting denied absent a request for a meeting. As to these two findings, I respectfully dissent.

Dated, Washington, D.C. December 16, 2014

Philip A. Miscimarra, Member

## NATIONAL LABOR RELATIONS BOARD

## APPENDIX

## NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE

## NATIONAL LABOR RELATIONS BOARD

## An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny you the right to be represented on request by a representative of your choosing at any investigatory interview that you reasonably believe could result in disciplinary action, as long as the chosen representative is available to participate at that time.

WE WILL NOT deny you the opportunity to confer with your chosen representative, prior to the investigatory interview.

WE WILL NOT deny the chosen representative the opportunity to speak at, and to participate in, the investigatory interview.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

SMITH'S FOOD AND DRUG CENTERS, D/B/A  
FRY'S FOOD STORES

The Board's decision can be found at [www.nlr.gov/case/28-CA-109817](http://www.nlr.gov/case/28-CA-109817) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations

Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



*William Mabry III, Esq.*, for the General Counsel.

*Frederick Miner, Esq. (Littler Mendelson, P.C.)*, for the Respondent.

## DECISION

## STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Phoenix, Arizona, on February 25, 2014. The complaint, which issued on October 29, 2013,<sup>1</sup> and was based upon an unfair labor practice charge and an amended charge that were filed on July 24 and September 25 by Amy Pfeifer, an individual, alleges that Smith's Food & Drug Centers, Inc. d/b/a Fry's Food Stores (the Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying Pfeifer her *Weingarten* rights. Specifically, it is alleged that on about July 16 the Respondent, by Greg Powell, its loss prevention specialist and an admitted supervisor and agent of the Respondent within the meaning of Section 2(11) and (13) of the Act, denied Pfeifer's request to be represented by a union representative of her choice during an interview when that representative was available, and denied her the opportunity to confer with shop steward, Marie Long, the union representative that she was supplied with, and ordered Long not to speak during the meeting. While denying that the conduct of the investigatory interview conducted on July 16 violated the Act, the Respondent admits that Pfeifer had reasonable cause to believe that the interview could result in disciplinary action being taken against her.

## I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent admits and I find that it has been an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act, and that United Food and Commercial Workers, Local 99, AFL-CIO (the Union), has been a labor organization within the meaning of Section 2(5) of the Act.

## II. THE FACTS

Pfeifer was employed as a barista at Tully's Coffee Counter located in Respondent's store 673 from 2011 to July 20, 2013. The Union and the Respondent are parties to a collective-

<sup>1</sup> Unless indicated otherwise, all dates referred to here relate to the year 2013.

bargaining agreement covering store 673 (the facility), as well as other of the Respondent's stores. There were two shop stewards at the store, Marie Long and Donna Millis; Kaitlyn Sullivan is employed by the Union as the lead union representative covering the store, and Pfeifer was a member of the Union. Shortly prior to July 16, there had been allegations of employee misconduct, including theft, that resulted in the termination of a number of employees at Tully's location at the facility and it was for that reason that Powell was at the facility on July 16 to meet with Pfeifer. The July 16 meeting took place in the manager's office at the facility, one flight up from the selling floor. Present at the meeting was Pfeifer, Powell, Sandra Lakso, the store's assistant manager, and Long.

Pfeifer testified that in either June or July she called Sullivan and left a message for her that because of what had happened to other employees at Tully's, she was concerned that she was going to be disciplined as well. Sullivan left a message for her saying that if she is called up to the office, she should call her and she would be there right away. Pfeifer was working on July 16 when Lakso asked her to come up to the office with her; she told her that "loss prevention" was there and wanted to speak to her. She walked in to the office and Powell introduced himself, asked her to have a seat, and to please turn her cell phone off, as she had it in her hand. She told him that she needed to have her union representative there and he shook his head signifying "no." She said that she understood that she was entitled to have her union representative with her during questioning; Lakso asked: "Do you mean Kaitlyn?" and Pfeifer said, "Yes, she is expecting my call." Powell again shook his head no and said that she could have the most available union person present, be it the steward or the representative. Powell then asked if the stewards were on the floor and Lakso said that Long was available. Pfeifer asked, "Are you kidding?" as she felt that Long lacked the knowledge or experience to assist her, and Powell said, "Well, that's who it is going to be" and told Lakso to have Long come to the office. Long came into the office and Lakso told her something to the effect of, "You just need to sit and observe." She was not given an opportunity to meet with, or talk to, Long prior to the meeting. Powell then began questioning Pfeifer; the meeting took about 30 minutes and as a result of the meeting, Pfeifer was suspended. During the meeting, Long did not say anything, or ask any questions.

Sullivan testified that Millis and Long are the union stewards and are the Union's "eyes and ears" in the store, but they do not have a role in investigatory interviews: "that's what we're [Union representatives] here for." For at least 4 years, stewards have received no training for investigatory interviews. In about June and July, several employees at Tully's were terminated, and in July Pfeifer called her and told her that she was having problems with her manager and she was afraid that when she returned to work on July 16 she was going to be suspended. Sullivan responded (probably by voice mail) that if she felt that she was going to be disciplined that she should say that she wanted union representation and "... let them know that she wants her Union rep present and then to contact me so I would be planning to be in the area on that day ... to represent her during the meeting." She was at the store that morning and took Millis to breakfast at a restaurant adjacent to the store. After

that she was in the parking lot doing some paperwork and then drove to some Safeway stores "down the road ... in the area." The first that she heard from Pfeifer that day was a voice mail at 3:36 p.m. saying that she had been suspended. She had her phone on all that day in case Pfeifer called her, but she did not notify the Respondent that she was available on that day to attend an interview, if one was conducted with Pfeifer. She testified that there is no agreement between the parties that the Respondent can only use shop stewards as their union representatives in these interviews.

Lakso testified that the company policy is that employees are entitled to union representation during an investigatory meeting, and when an employee requests representation:

A. We make sure we get them that request before any further proceedings go on.

Q. And is that limited to one specific person?

A. We have two stewards in our store.

A. And there's other individuals that can act as union representatives during investigatory meetings, correct?

A. Yes.

Q. And you know Kaitlyn Sullivan?

A. I have not met her.

On July 16 she asked Pfeifer to come upstairs with her to the manager's office; when they arrived at the office, Powell was the only other person present and he began questioning her about some alleged misconduct and she immediately asked for union representation.

Q. And, in fact, she asked to make a phone call, correct?

A. I don't recall that.

Q. Do you recall that she immediately asked to speak with Ms. Kaitlyn Sullivan?

A. Yes.

Q. And ... the way she was going to speak to Ms. Sullivan was to make a phone call to Ms. Sullivan, isn't that correct?

A. I don't recall that.

Q. Did she indicate how she was going to contact Ms. Sullivan?

A. She said she'd like to talk to Kaitlyn.

Q. Isn't it true she had her cell phone out, ready to make a phone call?

A. I don't remember seeing that.

Q. But you are sure that she wanted Ms. Sullivan to represent her during the investigatory meeting, correct?

A. She said Kaitlyn.

Q. Okay.

A. I'd like to talk to Kaitlyn ...

Q. Isn't it true that she indicated that Ms. Sullivan was expecting her phone call?

A. I don't think so. No, sir.

Q. She did not say that?

A. No, sir.

Powell told Pfeifer that because there was a union steward in the store, she would be called to come upstairs to represent her, and Long was called upstairs. Prior to Long entering the room,

## FRY'S FOOD STORES

Lakso had not informed her of her purpose in being there, and Long did not have an opportunity to meet with Pfeifer prior to the meeting. Powell told Long, "We'd like you to sit in as a Union representative to be able to witness and be there for Ms. Pfeifer." Powell then asked Pfeifer: "Will Marie be okay?" and she responded, "She'll do." Long and Pfeifer did not speak to each other during the meeting and Long did not say anything, or ask any questions, during the meeting, although Powell never told her that she could not participate in that manner.

Powell testified that he was at store 673 that day to investigate allegations of employee misconduct through theft by a number of employees at Tully's, including Pfeifer. When Pfeifer came in to the office, he explained the purpose of the meeting to her and she immediately asked for a union representative:

Q. In fact, she asked to have Ms. Kaitlyn Sullivan present as her Union representative, correct?

A. I don't remember if she specifically asked for a specific person.

Q. Do you recall her asking to make a phone call?

A. I do not recall that.

After Pfeifer asked for a union representative to be present with her, Powell asked Lakso to see which union steward was present at the time, and Lakso said that Long was a union representative and was at the facility, and she paged Long to come upstairs. When Long came into the room, he told her that "her presence was requested," and that she would be the union representative representing Pfeifer for the conversation that they were about to have, and "... that her job was to basically protect her rights, make sure that I wasn't belligerent, mean or violated her rights in any way." He was asked:

Q. But isn't it true that Ms. Pfeifer did not want Ms. Long to represent her?

A. She did not indicate that to me.

Q. So she never indicated that she wanted another Union representative present?

A. I do not believe so.

Pfeifer and Long did not speak during this meeting and Long did not say anything, or ask any questions during this meeting. He testified that the company policy is that when an employee requests union representation: "The procedure would be to stop any further questioning if we had started questioning and to find out who is most readily available, whether they be a Union steward or a business unit representative . . ."

Q. So then you would get them a representative, correct?

A. Yeah. And then we would provide who was most available.

Q. So if you had two representatives available, what would the procedure be?

A. To choose one of them, I guess.

Q. You would choose the representative?

A. I guess I would.

The Respondent does not have any written policy on what to do if more than one representative is readily available. In addition,

to his knowledge, Long was the only union representative available at that time. Although Long did not speak during the meeting, he did not tell her that she could not ask questions or object to anything that she observed.

Long has been employed by the Respondent for about 24 years and has been a member of the Union since about 1990. On July 16, Lakso told her that she was needed in the office upstairs, without any further explanation. Long testified, "I thought I was in trouble," and asked, "What did I do now?" and Lakso said, "Nothing." When she entered the room she saw Pfeifer as well as Powell, who she knew was from the loss prevention department. He asked Long if she knew Pfeifer and Lakso and she said that she did and then he said that he was going to ask Pfeifer some questions:

Q. What happened next?

A. Nothing really. He was asking questions and she was answering.

Q. Did he say anything to you what your role would be in the meeting?

A. No.

Q. Did he say anything in regard to whether or not you can ask questions?

A. No.

Q. Did he say that you could meet and confer with her?

A. No.

Q. Did anyone mention the word "observer" during this conversation?

A. Yes.

Q. Who mentioned that?

A. Sandy.

Q. And . . . how did that word come about?

A. She told me that I was there to observe and listen . . .

Q. Now, did you ask any questions in this meeting?

A. No.

Q. Why didn't you ask any questions.

A. I was not permitted to.

Q. And why do you believe that?

A. They told me I was just to be quiet. I was not to ask questions . . . I was there to listen and observe only.

On cross-examination, she testified that she was never specifically told not to ask any questions, but she inferred that from Lakso's comment that she was there to observe and listen. Prior to July 16, she participated in two or three other investigatory meetings since about 1990.

## III. ANALYSIS

It is clear that under the Supreme Court's decision in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), an employee, upon request, is entitled to have union representation at an investigatory meeting where she has reasonable grounds to fear that the meeting may result in disciplinary action being taken against her, and Respondent admits that Pfeifer did have reasonable grounds to fear that discipline could result from the July 16 meeting. The issue here is whether the Respondent satisfied this

*Weingarten* obligation by providing Long to represent Pfeifer on July 16.

There is credibility issue between the testimony of Pfeifer and that of Lakso and Powell. Pfeifer testified that after she learned the purpose of the meeting and entered the office, Powell told her to turn her cell phone off; she told him that she needed to have her union representative there and when Lakso asked if it was Sullivan, Pfeifer said, "Yes, she is expecting my call." Powell shook his head no, and said that she could have the most available union person present and in that situation, it was the steward, Long. Powell asked, "Are you kidding?" because she felt that Long lacked the knowledge or experience to assist her, but Powell responded, "Well, that's who it is going to be." Lakso supports Pfeifer's testimony in that upon entering the office she stated that she wanted to speak to Sullivan, while Powell denied that she asked to have Sullivan represent her, or that she wanted to make a phone call; he also denied that Pfeifer objected to Long representing her or indicated that she wanted to have another union representative rather than Long. I found Pfeifer's testimony, supported by Sullivan's testimony and Lakso's testimony in one respect, to be totally credible and I have no trouble crediting her testimony over that of Powell. Pfeifer told Powell and Lakso that Sullivan, who she wanted to represent her, was expecting her call. Rather than allowing Pfeifer to call Sullivan to determine her availability, Powell told her that she would have to have Long as her representative, and continued with the meeting.

In *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981), the employer had two facilities, each with a steward, separated by about 20 minutes. Although the employee requested that the steward at the other plant represent him in an investigatory interview, the employer refused, and provided him with the steward at the plant in which he was employed. The Board found this action lawful stating that *Weingarten* "... neither stated nor suggested that an employee's interests can only be safeguarded by the presence of a *specific* representative sought by the employee." In *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977), the employee requested representation by a certain steward to represent him at an investigatory meeting on a Friday; however, because that steward was on vacation and would not return to work until Monday, the employer denied the request and conducted the interview without a steward present. The Board found no violation. In *New Jersey Bell Telephone Co.*, 308 NLRB 277, 282 (1992), the Board stated: "When two union officials are equally available to serve as a *Weingarten* representative ... the decision as to who will serve is properly decided by the union officials, unless the employer can establish special circumstances that would warrant precluding one of the two officials from serving as representative." In the instant situation, there were no special circumstances that would allow Powell to appoint Long to represent Pfeifer. Clearly, Sullivan was more experienced in representing employees in these situations than Long, who participated in two or three such meetings over a twenty year period. *IBM Corp.*, 341 NLRB 1288, 1292 (2004). Counsel for the Respondent, in his brief, refers to an "unknown period of delay necessary ..." for Williams to get to the facility and that *Weingarten* rights do not apply where the employee's preferred representative is not

available. While it is true that they did not know how long it would take Sullivan to get to the facility, and, therefore, for how long the interview would have to be delayed, the matter could easily have been resolved by a phone call to Sullivan to determine her location at the time. They would have easily learned if Sullivan was readily available to come to the store to represent Pfeifer, as she and Pfeifer testified, or whether she was unavailable, and if she was not readily available, the choice of Long as her representative would have been permissible. However, Powell was unwilling to let her do that. I therefore find that the Respondent violated Section 8(a)(1) of the Act by denying Pfeifer the union representative of her choice, Sullivan.

The evidence is clear that although Long had no idea what Pfeifer's situation was, Pfeifer was not given an opportunity to discuss it with her prior to the meeting. Representative status is more than a mere presence. The representative must be familiar with the facts in order to properly represent the employee. By not allowing Pfeifer to discuss the facts with Long prior to the meeting, the Respondent violated Section 8(a)(1) of the Act. *Colgate Palmolive Co.*, 257 NLRB 130, 133 (1981). Lakso told Long that she was there "to listen and observe." When those words are spoken by the assistant manager of the store to an employee unfamiliar with representing employees in these situations, in the presence of the loss prevention representative, one can easily and reasonably interpret that to mean that you must remain silent. The Respondent therefore violated Section 8(a)(1) of the Act in this regard as well. *Barnard College*, 340 NLRB 934 (2003); *Washoe Medical Center*, 348 NLRB 361 (2006).

#### CONCLUSIONS OF LAW

1. The Respondent, Smith's Food & Drug Centers, Inc. d/b/a Fry's Food Stores, has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Local 99, AFL-CIO (the Union), has been a labor organization within the meaning of Section 2(5) of the Act.

3. By denying Pfeifer the representative of her choice at the investigatory interview conducted on July 16, and but denying her the ability to discuss the situation with Long, whom the Respondent chose to be her representative, and by implying that Long must remain silent during the interview, the Respondent violated Section 8(a)(1) of the Act.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.



## FRY'S FOOD STORES

## ORDER

The Respondent, Smith's Food & Drug Centers, Inc. d/b/a Fry's Food Stores, Phoenix, Arizona, its officers, agent, successors, and assigns, shall

1. Cease and desist from

(a) Denying its bargaining unit employees the right to be represented on request by a representative of his/her own choosing at any investigatory interview that the employee reasonably believes might result in disciplinary action, as long as that representative is available to participate at that time.

(b) Denying its employees at investigatory interviews that they believe might result in disciplinary action the right to confer with their representative prior to the interview.

(c) Denying the employees' representative at the investigatory interview the right to speak and participate freely in the interview.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at each of its stores in Phoenix, Arizona, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 16, 2013.

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<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 1, 2014

## APPENDIX

## NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE

## NATIONAL LABOR RELATIONS BOARD

## An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny to any of our bargaining unit employees the right to be represented on request by a representative of his/her choosing at any investigatory interview that the employees reasonably believe could result in disciplinary action, as long as the chosen representative is available to participate at that time.

WE WILL NOT deny to our bargaining unit employees the opportunity to confer with his/her chosen representative, prior to the investigatory interview, and WE WILL NOT deny the chosen representative the opportunity to speak at, and to participate in, the interview.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SMITH'S FOOD & DRUG CENTERS, INC. D/B/A FRY'S  
FOOD STORES